stated a sum of $458,512.19 as at 12 May 1986. The first auction was fixed on 12 December 1987 with a reserve price of $350,000 but on 3 December 1987 the defendants filed a summons-in-chambers applying for that auction to be postponed as the defendants were unhappy with the reserve price which had been fixed by the learned senior assistant registrar. The second auction was subsequently fixed on 9 April 1988 with a revised reserve price of $400,000 but there were no bidders.

By a summons-in-chambers filed on 14 June 1988, the plaintiff applied for the said property to be sold by private treaty at a reserve price of $345,000. This was strongly objected to by the first defendant (who incidentally had been adjudicated a bankrupt on 17 March 1986), who swore several affidavits to this effect on his own behalf and on behalf of his wife, the second defendant, stating that they had actually got a purchaser for $330,000 in late April 1988 and had informed the plaintiff's valuers about it who had chosen not to inform them of the $345,000 purchaser that they had at the same time. In the event, the defendants alleged that the non-disclosure of the valuers' purchaser amounted to bad faith which had the effect of making the sale by private treaty to the plaintiff's purchaser a collusive sale. As such, they preferred that another public auction be held with a lowered reserve price of $375,000.

Learned counsel for the plaintiff submitted that all these allegations had taken place in April 1988 whereas the defendants had consented by letter dated 18 June 1988 to the reserve price of $345,000. It was because of this consent that they had made this application for the sale by private treaty at that price.

Having considered the facts and perused the documents, I came to the conclusion that the proposed sale to the plaintiff's valuers' purchaser at $345,000 cannot be considered to be collusive as the price was in fact higher than that offered by the defendant's purchaser. I may have held otherwise if it was lower. Furthermore, the defendants had also consented to this price in June 1988.

I was against the idea of ordering another public auction with a lowered reserve price of $375,000 in view of the present state of the economy, the fact that any delay would only add on to the amount due, the fact that the order for sale was made almost two years ago, the fact that there were no bidders at the 9 April 1988 auction with the reserve price of $400,000, the fact that the defendants despite objecting to the reserve price of $350,000 at the cancelled 3 December 1987 auction had in June 1988 agreed to the $345,000 reserve price and were quite prepared to sell it to their purchaser for a price below that, namely, $330,000 and as stated earlier, the fact that the plaintiff had already got a purchaser who was willing to pay $15,000 more than the defendants' purchaser.

In the circumstances, I granted the order in terms of the plaintiff's application.

Application allowed.

Solicitors: *Chong, Poh & Lim; Almeida & Co.*

Reported by *Ng Sheau Jiuan*

Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor

HIGH COURT (KOTA KINABALU) – ORIGINATING SUMMONS NO 64 OF 1988
MOHAMED NOOR J
7 NOVEMBER 1988

Administrative Law – Declaration and certiorari – Whether mutually exclusive remedies – Case authorities based on post-1977 UK O 53 cannot be followed – Availability of certiorari cannot debar applicant from seeking declaration instead – Rules of the High Court 1980, O 15 r 16, O 53 r 1

Civil Procedure – Declaration and certiorari – Whether mutually exclusive remedies – Applicant failed to apply for leave for order of certiorari within prescribed time under O 53 r 1 of Rules of the High Court 1980 – Whether applicant precluded from seeking declaratory relief – Case authorities based on post-1977 UK O 53 cannot be followed – Rules of the High Court 1980, O 15 r 16, O 53 r 1

The plaintiff was served with a notice from the office of the first defendant requiring him to show cause as to why the state authority should not publish in the federal gazette that the Immigration and Passport (Exemption) Order 1984 shall not apply to the plaintiff. The effect of such publication would be that the plaintiff can only enter Sabah by using a proper passport. Pursuant to such notice, the plaintiff filed a notice of motion for leave to issue the writ of prohibition. Leave was refused (see [1988] 3 MLJ 171) and the first defendant signed the notification under the Immigration and Passport (Exemption) (Non-Application) (Sabah) Order 1984 (the 'Non-Application of Exemption Order 1984'). Thereafter the plaintiff did not proceed by way of certiorari to quash and nullify the notification but instead applied for declaratory orders challenging the validity of the Non-Application of Exemption Order 1984 and the notification.

The first defendant now applied to the court for an order that the plaintiff's application be struck out under O 18 r 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court. The application was based on the ground that the plaintiff's application, though in the form of a declaration, in substance and effect was for an order of certiorari made without the necessary leave as required under O 53 r 1 and as such it was an abuse of the process of the court. The first defendant relied mainly on the two English cases of *O'Reilly* v *Mackman & Ors*[1] and *Cocks* v *Thanet District Council*.[2]

Held, dismissing the application:

(1) The cases of *O'Reilly* v *Mackman & Ors*[1] and *Cocks* v *Thanet District Council*[2] were based on the new provisions of the English O 53 which was introduced in 1977. They cannot be followed since the new English O 53 and its statutory underpinning (under s 31 of the UK Supreme Court Act) have not been accepted here.

(2) Under the existing law, the court's discretion to make declaratory judgments cannot be fettered simply by the fact that in a particular case certiorari is also an available remedy but not applied for by an applicant. Even if certiorari is available to the applicant, that cannot debar him from seeking declaration instead. Declaration and certiorari are concurrent remedies and not mutually exclusive.

(3) The right of His Majesty's subjects to have recourse to the courts of law cannot altogether be excluded and the inalienable remedy of the subjects to seek redress cannot be taken away except by clear words of the statute.

Cases referred to

1 *O'Reilly* v *Mackman & Ors* [1982] 3 All ER 1124 (distd)
2 *Cocks* v *Thanet District Council* [1982] 3 All ER 1135 (distd)
3 *Government of Malaysia* v *Lim Kit Siang; United Engineers (M) Bhd* v *Lim Kit Siang* [1988] 2 MLJ 12 (folld)
4 *Pyx Granite Co Ltd* v *Ministry of Housing & Local Government & Ors* [1960] AC 260 (folld)
5 *Chop Chuah Seong Joo* v *Teh Chooi Nai* [1963] MLJ 96 (not folld)
6 *B Surinder Singh Kanda* v *Government of the Federation of Malaya* [1962] MLJ 169 (folld)
7 *Kuluwante (An Infant)* v *Government of Malaysia & Anor* [1978] 1 MLJ 92 (folld)
8 *Mahan Singh* v *Government of Malaysia* [1978] 2 MLJ 133 (folld)
9 *Sungai Wangi Estate* v *UNI* [1975] 1 MLJ 136 (refd)
10 *Datuk Syed Kechik bin Syed Mohamed* v *Government of Malaysia & Anor* [1979] 2 MLJ 101 (refd)

Legislation referred to

Rules of the High Court 1980 O 15 r 6, O 18 r 19, O 53 r 1
Specific Relief Act 1950 s 41
Rules of the Supreme Court [UK] O 53
Supreme Court Act [UK] s 31

Muhamad Shafee Abdullah (*Sugumar Balakrishnan* with him) for the plaintiff.

Stephen Foo Kiat Shin, State Attorney General, Sabah (*Athmat bin Hassan* with him) for the first defendant.

Cur Adv Vult

Mohamed Noor J: This is an application by the first defendant for an order that the plaintiff's originating summons dated 10 May 1988 (hereinafter referred to as 'the plaintiff's application') be struck out under O 18 r 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court. The application was based on the ground that the plaintiff's application, though in the form of a declaration, in substance and effect was for an order of certiorari made without the necessary leave as required under O 53 r 1 and as such it was an abuse of the process of the court.

This is the background of the present application. The plaintiff is a Malaysian citizen born in Peninsular Malaysia. He is an advocate and solicitor practising at Kota Kinabalu under the name and style of M/s Sugumar & Co of which he is the sole proprietor. On 7 December 1987 the plaintiff was served with a notice from the office of the first defendant requiring him to show cause as to why the state authority should not, pursuant to para 2 of the Immigration and Passport (Exemption) (Non-Application) (Sabah) Order 1984 (PU(A) 343/84) (hereinafter referred to as 'the Non-Application of Exemption Order 1984'), publish in the federal gazette that the Immigration and Passport (Exemption) Order 1984 (PU(A) 270/84) (hereinafter referred to as 'the Exemption Order 1984') shall not apply to the plaintiff. The effect of such publication would be that the plaintiff may not but can only enter Sabah, if allowed, by using a proper travel document, that is to say, a proper passport, whereas under the Exemption Order 1984, he had been allowed and had enjoyed the privilege of entering Sabah by producing only his national registration card. Pursuant to such notice, the plaintiff filed a notice of motion for leave to issue the writ of prohibition on 8 December 1987. Leave was refused by Abu Mansor J, on 11 December 1987. Then, on 15 December 1987 the first defendant signed the notification under the Non-Application of Exemption Order 1984 and the same was published in the federal gazette on 31 December 1987 vide PU(B) 712/87. Thereafter the plaintiff did not proceed by way of certiorari; hence, no application for leave under O 53 r 1 was made within the prescribed time; instead he proceeded by way of declaration.

In the plaintiff's application, several declarations were sought challenging the validity of the Non-Application of Exemption Order 1984 and the notification made thereunder mainly based on three grounds: the first ground is constitutional, viz the denial of equality under the provisions of art 8 of the Federal Constitution. The second ground is ultra vires, that is to say, the Order is not within the scope of the power given to the minister by the relevant Acts; and the third ground is that the impugned notification had been made contrary to the rules of natural justice.

The issue before me is really a question of law, that is to say, whether having failed to apply for an order of certiorari within the prescribed time the plaintiff is now precluded from seeking the said declarations. In short, whether declaration and certiorari are mutually exclusive remedies. The issue whether on the merits of the case the declarations asked for should be made or not is outside my present consideration. This is left to be decided at another forum.

The learned State Attorney General representing the first defendant contended that the effect of the declara-

tions sought by the plaintiff is to seek an order to quash and nullify the notification made by the first defendant. The most appropriate remedy provided by law under such circumstances is for the plaintiff to seek an order of certiorari; in which case O 53 comes into play. Order 53 prescribes a special procedure for the application for the issue of prerogative orders such as mandamus, prohibition and certiorari. Certain safeguards and restrictions have been built into it for the protection of public authorities on the ground of public policy, such as, on the need to apply for leave, in the case of certiorari leave must be sought within six weeks from the date of the decision, the requirement that the substantive application must be entered for hearing within 14 days after the grant of leave, and other requirements prescribed therein. These safeguards and restrictions are necessary not only for the protection of the public authorities from being harassed unnecessarily but also to save judicial time and to ensure a speedy disposal of any challenge against their decisions so that there will be an early determination as to the finality of such decisions lest they will not be kept in long suspense. Therefore, the plaintiff must strictly follow the special procedure under O 53 and should not be allowed to evade or circumvent it otherwise the following serious consequences would follow. Firstly, it would render the special procedure under O 53 for an order of certiorari nugatory. Secondly, without the time limit for the application for leave to apply for an order of certiorari under O 53, it would keep a decision-making public authority in suspense longer than necessary. Thirdly, a decision, the finality of which would otherwise be determined, would now be open to challenge again by another means. And lastly, an otherwise frivolous and groundless application which would have been struck out at an early stage under O 53 would be spared this fate if it is allowed to proceed under the guise of a declaration. The learned State Attorney General relied mainly on two English cases, viz *O'Reilly* v *Mackman & Ors*[1] and *Cocks* v *Thanet District Council.*[2] In the first case, the appellants who were prisoners sought declarations against the Board of Visitors of a prison to declare that a disciplinary award of forfeiture of remission of sentence by the board was null and void for breach of the rules of natural justice and/or alleged bias on the part of a member who presided over the hearing. The board applied to the High Court for striking out the proceedings as being an abuse of the process of the court on the ground that the proper remedy should be by judicial review to quash the decision of the board instead of a declaration. The court refused the application. However on appeal, the Court of Appeal struck out the proceedings. On further appeal to the House of Lords, the decision of the Court of Appeal was affirmed. The case was followed in the second case. In the second case, the question arose whether the appellant was entitled to proceed against the Thanet District Council, the respondents, for a declaration that the council owed him a duty under the Housing (Homeless Persons) Act 1977 to provide him with permanent accommodation or whether he should apply for judicial review to quash the council's decision that he had become homeless intentionally. Lord Bridge of Harwick held that it would amount to an abuse of the process of the court for an unsuccessful applicant for accommodation under the 1977 Act to challenge the decision of the housing authority by way of declaration rather than by judicial review under O 53.

It is to be noted that the decisions in the two cases were based on the new provisions of the English O 53 which was introduced in 1977. And without doubt, such decisions were arrived at because under the new O 53 the disadvantages, which formerly might have resulted in an applicant being unable to obtain justice in an application for certiorari under the old O 53, had all been removed, and that all remedies for infringements of rights protected by public law and also remedies for infringements of rights under private law if such infringements should also be involved, can be obtained on an application for judicial review. This is what was said by Lord Diplock in *O'Reilly* v *Mackman & Ors*[1] (at p 1131):

> ... It will be within the knowledge of all your Lordships that, at any rate from 1950 onwards, actions for declarations of nullity of decisions affecting the rights of individuals under public law were widely entertained, in parallel to applications for certiorari to quash, as a means of obtaining an effective alternative remedy. ... Nevertheless, I accept that having regard to the disadvantages, particularly in relation to the absolute bar on compelling discovery of documents by the respondent public authority to an applicant for an order of certiorari, and the almost invariable practice of refusing leave to allow cross-examination of deponents to affidavits lodged on its behalf, it could not be regarded as an abuse of the process of the court, before the amendments made to O 53 in 1977, to proceed against the authority by an action for a declaration ..., instead of applying for an order of certiorari ... Those disadvantages, which formerly might have resulted in an applicant being unable to obtain justice in an application for certiorari under O 53 have all been removed by the new rules introduced in 1977. There is express provision in the new r 8 for interlocutory application for discovery of documents, the administration of interrogatories and the cross-examination of deponents to affidavits.

And at p 1134:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was enti-

tled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.

With due respect, the ratio decidendi in the aforesaid two English cases cannot be followed here since we have not accepted the English new O 53 and its statutory underpinning (that is to say, s 31 of the English Supreme Court Act). Our present O 53 is in pari materia with O 53 under the pre-1977 English Rules. Therefore, there is no justification for me to depart from the principle enunciated by the highest court in England prior to January 1978 (the date of coming into force of the English new Rules) and which had been accepted by our courts. I am inclined to follow the decision in the Supreme Court case of *Government of Malaysia* v *Lim Kit Siang*; *United Engineers (M) Bhd* v *Lim Kit Siang*,[3] whereby the majority of the quorum declined to follow the English new O 53 in relation to the rule of locus standi, and instead followed the rule of locus standi accepted by the highest court in England prior to the said new O 53.

The most notable English case directly on point is *Pyx Granite Co Ltd* v *Ministry of Housing & Local Government & Ors*,[4] where Lord Goddard said (at p 290):

> It was also argued that if there was a remedy obtainable in the High Court it must be by way of certiorari. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

In Malaysia, Hepworth J, in *Chop Chuah Seong Joo* v *Teh Chooi Nai*,[5] expressed the view that declaration would not be available in a case where certiorari would lie. However, this view has not been acceptable generally. In *B Surinder Singh Kanda* v *Government of the Federation of Malaya*,[6] the plaintiff/appellant challenged his dismissal as null and void on the ground that the dismissing officer lacked authority to do so. It was suggested that the only remedy in such a case was certiorari. However, the Privy Council ruled that declaration was available too. In *Kuluwante (An Infant)* v *Government of Malaysia & Anor*,[7] Yusoff J (as he then was) opined that declaratory judgments and certiorari are concurrent remedies and not mutually exclusive. In *Mahan Singh* v *Government of Malaysia*,[8] declaration was asked for by the plaintiff/appellant though certiorari was also a proper remedy in the case. The Privy Council restored the judgment of Sharma J which declared that the order of dismissal of the plaintiff/appellant, a government servant, was bad because of failure to comply with the rules of natural justice.

Declaration is issued under s 41 of the Specific Relief Act 1950 (Revised 1974) and under O 15 r 16 of the Rules of the High Court 1980. The broad amplitude of the power of the High Court to make declaratory judgments had been dwelt upon by Abdoolcader J (as he then was) in *Sungai Wangi Estate* v *UNI*,[9] where it was said:

> Order 25 r 5 (now O 15 r 16) has the widest application ... It does not prescribe any special procedure, nor is it limited to any specific matter. It applies to all proceedings for a declaration ...

And in *Datuk Syed Kechik bin Syed Mohamed* v *Government of Malaysia & Anor*,[10] his Lordship Lee Hun Hoe CJ stated in relation to O 15 r 16:

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

It therefore follows from these cases that under the existing law the court's discretion to make declaratory judgments cannot be fettered simply by the fact that in a particular case certiorari is also an available remedy but not applied for by an applicant. That being the case, even if certiorari is available to the applicant, that cannot debar him from seeking declaration instead, that is to say, in an appropriate case the option is his. The right of His Majesty's subjects to have recourse to the courts of law cannot altogether be excluded and the inalienable remedy of the subjects to seek redress cannot be taken away except by clear words.

In the final analysis, I conclude that declaration and certiorari are concurrent remedies and not mutually exclusive. Therefore, the plaintiff is not precluded from seeking the said declarations and it is not an abuse of the process of the court. In view of such conclusion, it is not necessary for me to deal with the point raised by learned counsel for the plaintiff on whether declaration is a more appropriate remedy where the order challenged is of a legislative nature. Hence, the fifth defendant's application is hereby dismissed with costs to be taxed.

Application dismissed.

Solicitors: *Sugumar Balakrishnan & Co.*

Reported by *Ng Sheau Jiuan*